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Nos. 04-277 & 04-281

In the Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS,

v.

BRAND X INTERNET SERVICES, ET AL., RESPONDENTS.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS,

v.

BRAND X INTERNET SERVICES, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS EARTHLINK, INC., BRAND X INTERNET SERVICES, AND CENTER FOR DIGITAL DEMOCRACY

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QUESTION PRESENTED

Whether the "telecommunications" component of cable modem service constitutes a "telecommunications service" under the Communications Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents submit the following corporate information:

I. Respondent EarthLink, Inc. is a publicly traded company engaged primarily in the business of providing Internet access and related value-added services to business and residential customers nationwide. EarthLink, Inc. has no parent company and no wholly owned subsidiaries.

Sprint Corporation is a publicly traded corporation that has an ownership share in EarthLink, Inc. equal to or in excess of 10 percent. There are no other publicly traded companies that have ownership shares in EarthLink, Inc. of 10 percent or greater.

II. Respondent Brand X Internet Services is a privately held company, incorporated in California. It has no parent or subsidiaries.

III. Respondent Center for Digital Democracy is a not-for-profit corporation incorporated in the District of Columbia.

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STATEMENT

This case presents perhaps the single most important question under the telecommunications laws: who is a common carrier? That question has vital consequences because common carriers are presumptively required, absent forbearance by the Federal Communications Commission (FCC) under terms specified by Congress, to sell telecommunications services on a nondiscriminatory basis.

The Commission in the *Declaratory Ruling* under review specifically addressed the regulatory classification of "cable modem service"—a marketing bundle provided by cable companies that combines a high-speed telecommunications link with various information processing services such as e-mail. The Commission recognized that, if cable companies sold the telecommunications standing alone, they would be

offering a "telecommunications service" subject to regulation as common carriage. Nevertheless, it concluded that, merely by marketing that telecommunications bundled with additional services, the cable companies removed themselves from Congress's common carriage regulatory scheme. The FCC's reasoning is not limited to the classification of cable modem service, but instead applies equally to all bundled offerings that combine telecommunications with an information processing capability. The Ninth Circuit rejected the Commission's conclusion, having found in a prior case that a contrary conclusion was required by the plain statutory text, vacated the Commission's *Declaratory Ruling* in relevant part, and remanded for further Commission action not inconsistent with the court's ruling.

1. The Telecommunications Act of 1996 updates the common carrier regime codified by Congress in the Communications Act of 1934 (the Act). The central defined term of the amended Act is "telecommunications service," which is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46). In turn, "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

The statute presumptively subjects each "telecommunications service" to regulation as common carriage. Every "telecommunications carrier"—defined to mean "any provider of telecommunications services"—is "treated as a common carrier * * * to the extent that it is engaged in providing telecommunications services." 47 U.S.C. 153(44). Almost all of the Act's central regulatory requirements follow from the designation of a service as a "telecommunications service," and hence common carriage. Principally, a common carrier is required "to furnish such communication service upon reasonable request therefor," *id.* § 201(a), and not to discriminate in

its sales of telecommunications services, see *id.* § 202. Telecommunications carriers are also required to interconnect their facilities, see *id.* § 251, and to contribute to the federal "universal service" fund that is used to ensure affordable telecommunications services throughout the nation, see *id.* § 254.

In the 1996 Act, at the same time that it reaffirmed common carriage as the core concept of the telecommunications regulatory scheme, Congress granted the Commission the power to "forbear from applying" various common carrier obligations to providers of telecommunications services. Section 706 of the 1996 Act directs "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services [to] encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" by utilizing various measures including "regulatory forbearance." 47 U.S.C. 157 note. Before the Commission may exercise its authority, it must find that enforcement of the statutory provision or regulation at issue is not necessary to prevent unjust or discriminatory practices or to protect consumers, and that forbearance will be in the public interest. See *id.* § 160(a).

2. As the Commission has repeatedly acknowledged, Congress enacted the definitional provisions of the 1996 Act to carry forward the framework of the Commission's *Computer Inquiries*[1] and the Modification of Final Judgment governing the breakup of AT&T (AT&T MFJ).[2] See, *e.g.*, *Federal–State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11,501, 11,511, ¶ 21 (1998). The Commission in the *Computer Inquiries* and the D.C. Circuit in implementing the AT&T MFJ repeatedly confronted bundled commercial offerings in which a telecommunications carrier

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[1] See Pet. App. 89a n.139 (detailing the history of these Commission proceedings). "Pet. App." refers to the corrected appendix to the petition for a writ of certiorari in No. 04-281.

[2] *United States* v. *AT&T*, 552 F. Supp. 131 (DDC 1982).

marketed a telecommunications link together with information processing functions. Carriers argued that, because the telecommunications link would be used to access the information processing function, the telecommunications component was no longer regulated. Both the Commission and the D.C. Circuit flatly rejected that argument, holding that the communications component of the bundled offering remained presumptively regulated as common carriage. Any other result, they explained, would permit carriers to circumvent common carriage regulation merely by packaging their telecommunications with some information processing capability. See, *e.g.*, *United States* v. *Western Elec. Co., Inc.*, 907 F.2d 160, 163 (CADC 1990); *Independent Data Mfr's Ass'n, Inc.*, Mem. Op. & Order, 10 F.C.C.R. 13,717, 13,723, ¶ 44 (1995).

The Commission applied the framework of the *Computer Inquiries* and the AT&T MFJ, as incorporated by Congress into the Act in 1996, in determining the regulatory status of Digital Subscriber Line (DSL) service. DSL-based Internet access is a high-speed Internet access service essentially identical to cable modem service except that it is offered over telephone wires. The telephone companies bundled the telecommunications component with information processing features such as e-mail and, on that basis, claimed that the telecommunications was not a "telecommunications service." The Commission rejected that argument, however, holding that the communications component remained regulated as common carriage. See, *e.g.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998).

3. The Commission in its *Declaratory Ruling* in this case confronted the regulatory classification of "cable modem service." That term refers to a bundled offering by cable companies of (i) high-speed telecommunications, and (ii) various information processing functions such as e-mail and personal web pages. Subscribers purchase the bundled offering principally for its telecommunications. The high-speed access provided by cable modem service is vastly preferable to the

much slower "dial-up" connection provided by traditional telephone service. But each subscriber generally has only one cable provider. Cable companies take advantage of the desirability of their exclusive offering to require subscribers to purchase not just high-speed telecommunications but information processing features as well.

It is undisputed that the two components of cable modem service are sold together simply for marketing purposes, not because they must be combined as a technological matter. Although subscribers can use the communications component to access the cable company's information processing functions, they can just as easily avoid the latter altogether and instead use e-mail services and web pages provided by third-party Internet service providers (ISPs) such as respondents Brand X and EarthLink, although the bundle sold by the cable companies forces subscribers to pay twice for the same information processing service in order to do so.

a. From the Telecommunications Act's adoption in 1996 until 2002, the Commission refused to classify cable modem service. In the *Declaratory Ruling* now under review, the Commission finally did so. The Commission rejected respondents' arguments, and held that "[c]able modem service is not itself and does not include an offering of telecommunications service to subscribers." Pet. App. 95a. Notably, it did not doubt that, if a cable company separately provided subscribers the telecommunications connection between their homes and the cable company's facilities, it would be providing a "telecommunications service." *Id.* 96a-97a. Contrary to its prior holding that Congress adopted the structure of the *Computer Inquiries* and the AT&T MFJ, however, the Commission declined to apply that structure to cable modem service. *Id.* 102a. The Commission found it decisive that cable companies do not offer subscribers the telecommunications component of cable modem service on a stand-alone basis, but rather market them together. See *id.* 97a, 101a.

The Commission also concluded that the commercial bundle of services was solely an "information service," with the asserted consequence that the entire bundle—including the telecommunications component—is not subject to the title II common carrier regime. The Communications Act defines an "information service" in relevant part as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). Despite the fact that the definition describes a capability that is delivered "via telecommunications," the Commission asserted that an information service may not include a telecommunications service because the two classifications are "mutually exclusive." Pet. App. 97a.

The Commission also relied heavily on its view that, as a policy matter, broadband Internet services such as cable modem service and DSL should be deregulated to the extent possible. Pet. App. 46a-48a. It did not, however, address the contention that Congress directed that such concerns be addressed through the statutory forbearance criteria in 47 U.S.C. 160.

The Commission recognized that the Ninth Circuit had previously reached the opposite result in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (2000), holding that the telecommunications link of cable modem service is a "telecommunications service" under the Communications Act. But the Commission deemed that ruling unpersuasive on the procedural basis that the court of appeals had not, in the Commission's view, received sufficient briefing or the benefit of a sufficient record. See Pet. App. 115a-116a.

b. Commissioner Copps issued a pointed dissent. He could not "conceive that Congress intended to remove from its statutory framework core communications services such as the one at issue in this proceeding," a result under which "its statutory handiwork [would be made] obsolete." Pet. App. 199a. "Today we take a gigantic leap down the road of re-

moving core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another. * * * * With so much at stake, I would have hoped for a little more modesty and measured pace on our part." *Id.* 202a-203a. "Years ago, when I worked on Capitol Hill," Commissioner Copps explained, "we used to worry about legislation on an appropriations bill. Down here, I'm learning that I have to look out for legislation on an NPRM." *Id.* 201a.

4. Petitions for review of the FCC's ruling were consolidated before the Ninth Circuit, which vacated in relevant part the Commission's *Declaratory Ruling* and remanded for further proceedings. The court of appeals held that the case was controlled by its prior precedent.

a. In its *City of Portland* decision, the Ninth Circuit distinguished for regulatory purposes the "two elements" of cable modem service: "a 'pipeline' (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline." 216 F.3d at 878. The court classified the telecommunications component in light of the plain text of the Act and the prior *Computer Inquiries* framework that Congress had adopted. To the extent the cable company merely provides information processing functions, the court of appeals concluded, "its activities are that of an information service." *Ibid.* But with respect to "its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *Ibid.* The court of appeals noted, however, that the classification of a service did *not* determine the extent to which it would ultimately be regulated, given the Commission's "broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest." *Id.* at 879.

b. In this case, the Ninth Circuit deemed *City of Portland* controlling as a matter of *stare decisis* because that decision had turned on the plain terms of the Act, as opposed to engaging in "deferential review of agency decisionmaking." Pet. App. 18a (quoting *Mesa Verde Constr. Co.* v. *Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (CA9 1988) (en banc) (alterations omitted)). It found that conclusion supported by the holding of *Neal* v. *United States*, 516 U.S. 284, 294-95 (1996), that "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." Pet. App. 20a.

Judge Thomas concurred to make clear that he would have reached the same result even if *City of Portland* were not binding. Pet. App. 25a. "Nothing in the definition [of telecommunications service] suggests that the telecommunications component must be priced or offered separately in order to qualify as a telecommunications service. Under the FCC's approach, the general public would be purchasing a service that nobody offered." *Id.* 31a. He found that conclusion reinforced by the statutory scheme as a whole:

> In order to foster this competition, the 1996 Act applies the traditional common carrier obligations of nondiscrimination and interconnectivity to telecommunications service providers "regardless of the facilities used." 47 U.S.C. § 153(46). Application of these principles to cable modem service would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice. Naturally, the FCC may choose to forbear from enforcing these regulations if it determines they are not necessary to promote competition or protect consumers. 47 U.S.C. § 160(a)–(b). Nonetheless, the Act creates a general presumption in favor of opening markets to competition.

Id. 34a-35a.

5. The Commission petitioned for rehearing en banc, arguing that the Ninth Circuit should overrule *City of Portland*. The Department of Justice declined to join the petition. Immediately after the petition for rehearing en banc was filed, the Department, joined by the Office of the Solicitor General, filed a letter with the Commission stating "that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA [the Communications Assistance for Law Enforcement Act, 47 U.S.C. 1001 *et seq.*]." EarthLink BIO App. 14a.[3] CALEA requires "telecommunications carriers" to design their networks so as to make them more readily accessible to law enforcement authorities conducting lawful electronic intercepts. See 47 U.S.C. 1002. However, the statute excludes from the definition of "telecommunications carrier" "persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i). Hence, if the Commission's conclusion in the *Declaratory Ruling* that cable modem service is exclusively an information service applies under the parallel terms of CALEA, cable modem facilities are exempt from that statute's law enforcement provisions.

6. No active judge called for a vote on the petition for rehearing en banc, and the petition was denied. Pet. App. 207a. The Commission then instituted a rulemaking on CALEA under which it proposes to deem cable modem service solely an "information service" under the Communications Act, but not an information service at all under CALEA. See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 F.C.C.R. 15,676, 15,706, ¶ 50 (2004). The Department of Justice then filed a joint petition for certiorari in this Court, which was granted. See 125 S.Ct. 654, 655 (2004).

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[3] "EarthLink BIO App." refers to the appendix to EarthLink's opposition to certiorari in Nos. 04-277 and 04-281.

SUMMARY OF ARGUMENT

The question presented by this case is what test Congress intended to use in determining whether a telecommunications offering is common carriage. The question arises in the context of "bundled" offerings of two services marketed together—here, "cable modem service," which is a combination of high-speed telecommunications over cable wires and additional information processing services such as e-mail. The Commission does not dispute that when the telecommunications component is sold standing alone, it is a "telecommunications service" and hence common carriage. Respondents contend it makes no difference under the statute whether that telecommunications is marketed together with some other service. The Commission rejected that argument, deeming it decisive that the provider chooses to sell the two services together. As a result, providers such as cable companies are free to avoid common carriage regulation so long as they sell their telecommunications only as part of a marketing bundle.

The determination whether an offering is common carriage has vital consequences; there may be no more important question under the telecommunications laws. Most important, common carriers presumptively must make telecommunications services available at nondiscriminatory rates to any willing buyer. Thus, in this case, if the telecommunications component of cable modem service is a "telecommunications service," and hence common carriage, the cable companies cannot discriminate against independent Internet service providers (ISPs) such as respondents EarthLink and Brand X. Customers then will be able to choose their provider of Internet services—whether the cable company or third parties—on the merits of their information service offerings. By contrast, under the regime adopted by the Commission in this case, the cable companies can circumvent that obligation, thereby limiting competition and forcing their customers to purchase both telecommunications and other services such as e-mail from them as a package, merely by marketing the two together.

The Commission's position cannot be reconciled with the statutory text, the administrative and judicial framework on which the statute was based, or the policies that Congress was pursuing. The Commission has made no serious argument that the telecommunications component of a bundled offering does not qualify as a "telecommunications service," which the statute defines as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 U.S.C. 153(46). The Commission does not dispute that the telecommunications component of cable modem service is a telecommunications service if sold standing alone. Nothing in the definition of telecommunications service suggests that a different result follows if the telecommunications is marketed together with some other service.

Congress could not have intended the question of regulatory classification to turn on the provider's self-interested marketing decision. If anything, when a provider combines common carriage with some other service, the nondiscrimination rationale underlying common carriage regulation is *enhanced*. The combination makes it all the more likely that the provider will use its control over the telecommunications component to discriminate against competitors in the market for the further service. This case is a perfect illustration, as customers who seek to purchase independent Internet access services must effectively pay for that class of services twice: once as part of the cable modem service bundle, and a second time from independent providers such as respondent ISPs.

The Commission's contrary position rests on its assertion that cable modem service satisfies the statutory definition of an "information service" as an "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). That is entirely beside the point. Respondents do not contend that cable modem service—*i.e.*, the bundled information service package—should

be regulated as common carriage. Rather, respondents contend that the *telecommunications component* of cable modem service is a telecommunications service.

So, in order to successfully defend its *Declaratory Ruling*, the Commission must prevail on its argument that an information service cannot contain a regulable telecommunications service—in its words, that the categories are "mutually exclusive." That argument, which is the nub of its position, is completely meritless. There is nothing in the text of the statute, the policies underlying it, or the legislative history that suggests Congress intended the category of "information services" to be exclusive of any other regulatory classification.

Any doubt about the classification of the telecommunications component of cable modem service is resolved by the framework that Congress adopted in enacting the definitions at issue. The Commission has repeatedly recognized—but now inexplicably attempts to disavow—that Congress adopted the terms "telecommunications service" and "information service" to parallel similar terms in the Commission's own *Computer Inquiries* and the AT&T MFJ. It is *decisive* that in those proceedings the Commission and the courts confronted precisely the question now at issue here—whether common carriage telecommunications lost that character when combined by a provider with an information service—and both decided it the opposite way. The Commission and the courts recognized in those proceedings that the very rule the Commission now adopts would produce the absurd result, which Congress could not have intended, that a carrier can effectively deregulate itself through the nicety of combining its regulated offering with some other service.

The Commission attempts to save its position by invoking Congress's broad goal of deregulating telecommunications. That argument is misplaced, for the plain terms of the statutory definitions are controlling. Congress moreover created a specific "forbearance" regime to guide and constrain the Commission in determining when to lift common carriage

regulation. The Ninth Circuit's ruling in this case properly leaves it to the Commission on remand to apply the statutory criteria to decide whether to lift the common carrier requirements presumptively applicable to the telecommunications component of cable modem service.

Finally, the *Declaratory Ruling* is not entitled to *Chevron* deference and, even if it were, respondents would prevail. It is not plausible to conclude that Congress delegated to an agency the fundamental question—on which essential aspects of telecommunications regulation rest—of what test to use in deciding whether services offered to tens of millions of Americans are common carriage. See *MCI* v. *AT&T*, 512 U.S. 218, 229-30 (1994). The Commission's claim to deference is moreover severely undercut by the substantial inconsistencies in its position: both in the Commission's rejection of its prior recognition that Congress intended to adopt the framework of the *Computer Inquiries* and the AT&T MFJ, and in its conclusion under the parallel law enforcement provisions of CALEA that cable modem service is *not* an information service. Finally, although the Ninth Circuit's decision in *City of Portland* is of course not binding here—in contrast to the proceedings in the court of appeals—the Commission erred in ignoring the substance of that prior judicial construction of the statute.

ARGUMENT

This case presents perhaps the most fundamental question in federal telecommunications law: who is a common carrier? The Commission has adopted a reading of the statute under which carriers themselves may choose not to be regulated simply by adding an information processing component to a transmission service—a service that the Commission concedes would be a common carrier telecommunications service if it were offered alone. The Commission's approach would render much of the Communications Act a nullity and leave the Commission without the authority to regulate in any

meaningful way vast communications networks serving millions of people over public rights of way.

This case is specifically about cable modem service, but the Commission has clearly indicated its intention to follow the same course with respect to DSL service provided over telephone wires. See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3033, ¶ 25 (2002). Moreover, there is nothing in the Act or in the Commission's *Declaratory Ruling* that would limit the rule enunciated by the Commission to "broadband" offerings. Thus, for example, it would be possible for a telephone company that provides dial-up Internet access service (or any other information service) over its own facilities to combine that information service with basic telephone service and thereby to escape regulation of the underlying transmission service. The Commission's decision would thus allow all carriers to opt into or out of regulation purely on the basis of whether they chose to offer their services under a single bundled price, or instead under separate prices. That is not a reasonable reading of either the Act's individual provisions or the statute as a whole.

I. "CABLE MODEM SERVICE" IS MERELY A TERM DESCRIBING CABLE COMPANIES' SALE OF TWO DIFFERENT PRODUCTS BUNDLED TOGETHER: TELECOMMUNICATIONS AND INFORMATION PROCESSING.

This case presents the question of how to classify so-called "bundled offerings"—commercial combinations of two otherwise separate products—under the Communications Act of 1934 as amended by the Telecommunications Act of 1996. As we discuss *infra* Part II, the answer to that question is that the telecommunications component of the bundled offering retains its separate regulatory status. In this Part, we describe the bundle at issue in this case, "cable modem service."

Cable modem service is a form of "broadband" Internet access service. The other major broadband product is Digital Subscriber Line (DSL) service. Pet. App. 50a. The difference is that cable modem service is provided by cable companies over cable wires, while telephone companies provide DSL service over telephone wires.

Cable modem service has two components: a telecommunications link to the Internet, described by the Commission as "Internet connectivity," Pet. App. 61a, and various information processing features. As the Commission explains, the second component includes "access to unique content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." FCC Br. 20 (quoting Pet. App. 52a-54a) (alterations omitted).

Cable companies market these two components as a single package under the label "cable modem service," and they refuse to sell the two components separately. The reason they do so is obvious. Most households in America have only one cable provider. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Eleventh Annual Report*, 2005 WL 275740, ¶ 136 (2005). The high-speed Internet access that cable lines provide is highly desirable, see *infra* Part III.B.3, so cable companies require their subscribers who want high-speed transmission to purchase information processing features as well.

To be sure, the transmission and information functions of cable modem service are related. The Commission emphasizes their relatedness. It explains that the subscriber uses the high-speed telecommunications pipeline to access various information features. For example, subscribers can use the communications link to retrieve e-mail provided by the cable company or can access a personal web page provided by the cable company. See FCC Br. 20.

But the Commission's emphasis on the relatedness of the two components of cable modem service is incomplete and,

as a consequence, misleading. It omits that the telecommunications and information components are physically separate. Still more important, the fact that the two components can be used together omits that they can equally be used *apart*, as they have been for years on the telephone-wire-based DSL platform. The Commission itself has consistently "distinguished between the common carrier offering of basic transmission service, which provides a communications path for the movement of information, and the offering of enhanced services, which * * * [consist] primarily of data processing services." *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7419-20 (2001). The fact that AOL Time Warner provides transmission services to unaffiliated ISPs under merger conditions imposed by both the FCC and the Federal Trade Commission demonstrates that the two components are separate. See Pet. App. 110a–111a.

To take the Commission's own examples, FCC Br. 20, the subscriber is perfectly able to use the transmission component of cable modem service to access different content, a different e-mail service, different news groups, or a different service for providing a personal web page. It is thus critical that the Commission conceded repeatedly in the ruling under review that subscribers were not required to use the information services offered by the cable company, but could "click through" those services and use the telecommunications component of cable modem service for the sole purpose of reaching information services offered by other providers. See Pet. App. 57a, 78a, 146a.[4]

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[4] Even the term "click through" is misleading, because it suggests that the subscriber must actually use the cable company's information processing features. That is not the case.

The Commission correctly does not contend that the telecommunications and information processing components of cable modem service are inextricably intertwined on the basis that the cable company's computers manage the telecommunications network, such as by issuing Internet Protocol addresses to subscribers' com-

Just as the subscriber can use the transmission component of cable modem service to reach third-party services, that subscriber can also use the information features provided as part of the cable modem service bundle entirely separate and apart from the telecommunications link provided by the cable wires. Thus, subscribers who have a cable modem service account at their home can just as easily access the information processing features from other places. For example, they can retrieve that unique content, e-mail and personal web pages from a high-speed Internet connection at work, or they can use those features while traveling through a dial-up connection or a high-speed connection at an Internet cafe.

In sum, cable modem service is a marketing bundle of two distinct services.

II. UNDER THE PLAIN TEXT OF THE STATUTE, CABLE MODEM SERVICE INCLUDES A TELECOMMUNICATIONS SERVICE.

The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The FCC concluded in its *Declaratory Ruling* that "[c]able modem service is not itself and does not include an offering of

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puters. Every telecommunications system includes incidental information management components. The telephone network, for example, must assign and recognize phone numbers. The Act accordingly excludes those capabilities from the definition of "information service," which "does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. 153(20).

telecommunications service to subscribers." Pet. App. 95a. The second of those conclusions—that cable modem service does not *include* a telecommunications service—is contrary to the plain text of the statute, as well as to prior precedent under which the telecommunications component of an information service retains its independent regulatory status. The Commission has repeatedly recognized that Congress codified that precedent when it adopted the relevant statutory definitions in 1996.

A. The Telecommunications Link Provided by Cable Modem Service Satisfies Each Element of the Definition of "Telecommunications Service."

1. The Commission concedes that the transmission component of cable modem service constitutes "telecommunications." "The Commission has previously recognized that 'all information services require the use of telecommunications to connect customers to computers or other processors that are capable of generating, storing, or manipulating information.'" Pet. App. 96a (footnote omitted) (alterations omitted). The transmission component of cable modem service carries information between the subscriber's computer and computers that support applications such as e-mail and web pages on the Internet. That transmission does not change the form or content of the information. Instead, changes to the information occur in the computers at the ends of the transmission lines.

Having established that the transmission involved in cable modem service is "telecommunications"—both because it meets the definition of that term and also because the definition of "information service" specifies that a service is only an information service if it is provided "via telecommunications," see 47 U.S.C. 153(20)—the only remaining issues regarding the definition of telecommunications service are whether the telecommunications is offered (i) "for a fee" (ii) "directly to the public." *Id.* § 153(46).

In the case of cable modem service, the offering obviously meets both prongs of the test. Cable modem service is offered as a mass-market service to the public. "As of December 2003, there were 16.4 million cable modem lines in use," FCC Pet. 25, and of course users must pay the subscription "fee" to the cable company. The Commission does not contend otherwise, and has never contested that the telecommunications component of cable modem service is offered "for a fee directly to the public." 47 U.S.C. 153(46). Moreover, the fact that the telecommunications so offered uses cable wires rather than telephone wires is entirely irrelevant, because "telecommunications service" is defined functionally, "regardless of the facilities used." *Ibid.* The Commission agrees. See Pet. App. 90a. That is the beginning and the end of the statutory analysis.

Verizon Communications, which argues vociferously in its brief before this Court that cable modem service is solely an information service, captured the statutory terms perfectly when it took precisely the opposite position before the Commission in the proceeding below:

> This question answers itself. * * * Although cable operators also afford customers access to proprietary content, representatives of the cable industry have testified that cable modem customers can completely "bypass" that content and "access AOL, other subscription services, or any website accessible over the public Internet with 'one click' of [a] computer mouse." Indeed, AT&T [Broadband Cable Services] has "committed" to the Commission that it will facilitate "maximum access by its customers to any content of their choosing," and that customers can reach any Internet destination without having to "go through" AT&T's affiliated ISP or "view any * * * content or screens" provided by that ISP. Cable operators are thus offering for a fee to the public a service that transmits "information of the user's choosing, without change in the form or content of the information as sent and received" "between or among points specified

> by the user" -- in other words, a telecommunications service. This conclusion is the only one that can be squared with the Act and the Commission's precedents.

Comments of Verizon Comms., FCC GN Docket No. 00-185, at 10-11 (Dec. 1, 2000) (footnotes omitted) (alterations in original).

2. The Commission notably has never disputed that a cable company would be offering a telecommunications service if it offered, on a stand-alone basis, that telecommunications link. See, *e.g.*, FCC Br. 24; Pet. App. 97a. If this Court is to sustain the Commission's *Declaratory Ruling*, therefore, it must do so on the ground that Congress intended that by "bundling" two distinct functions, the carrier could eliminate the separate regulatory status of each of the service's constituent parts and thereby exempt itself from common carrier regulation.

The FCC contends that cable modem service does not include a telecommunications service because it combines telecommunications with information processing features, rather than offering telecommunications on a "stand-alone" basis. "'As provided to the end user,' the 'telecommunications component' of cable modem service is not offered 'separately from the data-processing capabilities of the service,' but 'is part and parcel of' the service being offered." FCC Br. 23 (quoting Pet. App. 96a) (alterations omitted).

The simple answer is that the definition of "telecommunications service" does not refer to a "stand-alone offering." The Commission points to no language in the Act to support this additional requirement, nor could it. Neither the Commission, see *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957), nor the courts, see *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993), may "add terms or provisions where congress has omitted them," *ibid.* Moreover, when Congress intended for the classification of a service to turn on whether a separate fee was charged, it said so explicitly. See 47 U.S.C. 153(48) (defining "telephone toll service" as "tele-

phone service * * * for which there is made a separate charge").[5]

The force of the plain text of the statute is substantially reinforced when the absurd result of adding limitations is that carriers can circumvent the regulatory consequences of classification as "telecommunications service" merely by marketing that service together with some information processing feature. Were that the case, common carriage regulation would fall apart, as each provider sold its telecommunications service bundled with an information service delivered over that telecommunications link.

B. Congress's Intent to Recognize the Presence of a Telecommunications Service in Bundled Products is Plain from Its Adoption of the Framework of the Commission's Prior *Computer Inquiries* and the Order Breaking Up AT&T.

Any doubt about the proper construction of the term "telecommunications service" is resolved by the framework upon which Congress based the regulatory categories of the 1996 Act. Prior to that Act's adoption, the Commission had repeatedly confronted the proper regulatory classification of bundled communications and information processing services in the *Computer Inquiries*, in which the Commission established the categories of "basic" and "enhanced" services. The courts had confronted closely analogous issues in the Modifi-

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[5] The cable industry petitioners echo the Commission's argument in the guise of the term "offering." They contend that cable modem service constitutes the "offering" of the bundled package, not the telecommunications. An "offering" is defined as "a thing offered." The New Oxford American Dictionary 1188 (2001). In turn, to offer is to make something "available for sale." *Ibid.* That plain meaning says nothing about a separate offering. It may well be that cable companies offer their subscribers "cable modem service." But it is equally true that subscribers are "offered" the high-speed telecommunications link that cable modem service provides.

cation of Final Judgment governing the break-up of AT&T (AT&T MFJ), which created the categories of "telecommunications" and "information services." *United States* v. *AT&T*, 552 F. Supp. 131 (DDC 1982).

1. The Commission has repeatedly acknowledged that Congress specifically adopted the *Computer Inquiries* and the AT&T MFJ as the basis for the statutory provisions at issue here:

> Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" *to parallel* the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.

Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11,501, 11,511, ¶ 21 (1998) (emphasis added) (*Universal Service Report to Congress*); see also Pet. App. 89a-90a n.139 (collecting authorities implementing the *Computer Inquiry* basic/enhanced framework and reaffirming that the definition of "information service" follows from these precedents). As the parties and *amici* supporting the Commission admit, the FCC has repeatedly acknowledged that "information service" is "a term that, for present purposes, is equivalent to the 'enhanced services' designation the FCC developed in the *Computer Inquiry* proceeding." Bellsouth Br. 6 (collecting authorities). See also Telecomm. Indus. Ass'n Br. 8 (the categories of the *Computer Inquiries* "were essentially re-named and codified by the 1996 amendments to the Act" (collecting authorities)); H.R. REP. No. 104-458, at 115-16 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 126-27

(expressing Congress's intent to adopt the framework of the AT&T MFJ).[6]

In the *Computer Inquiries*, the Commission defined the terms "basic service" and "enhanced service" to distinguish the former as telecommunications from the latter as a *combination* of telecommunications and information processing. An enhanced service necessarily included a basic service:

> We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service *combines* basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.

Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, ¶ 5 (1980) (emphasis added) (*Computer II*).

2. Given that Congress intended the terms "telecommunications service" and "information service" in the 1996 Act to have the same meaning as the parallel terms in the *Computer Inquiries* and the AT&T MFJ, it is *decisive* that those prior proceedings confronted precisely the same question as in this case and held that the telecommunications components of bundled offerings were common carriage.

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[6] The Commission mischaracterizes respondents' position as claiming that Congress, by adopting the *Computer Inquiries* framework, "froze" the regulatory regime—*i.e.*, the Commission claims that respondents read the statute to require that telecommunications services ultimately must be subject to the statute's nondiscrimination requirements, as under the *Computer Inquiries*. See FCC Br. 17. In fact, respondents argue only that the relevant definitions set the starting point for regulatory decisions. Congress adopted the forbearance procedures of 47 U.S.C. 160 to provide the Commission with ample authority to adjust that default regime.

In and after the *Computer Inquiries*, the Commission repeatedly held that the telecommunications component of a bundled package offered by the owner of a telecommunications facility is separately regulated, such that the telecommunications component remains a "basic service" regulated as common carriage. As the FCC concluded in terms that precisely parallel the statutory inquiry here:

> Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1, 141, ¶ 274 (1988) (footnotes omitted). As the FCC acknowledges, under the *Computer Inquiries*, although "facilities-based common carriers could integrate their common-carrier and enhanced-service offerings," the common-carrier component remained subject to regulation under Title II of the Communications Act, while the "enhanced services * * * remain[ed] free from Title II regulation." Br. 35 (citations omitted). A contrary approach, the Commission said,

> would allow *circumvention* of the Computer II and Computer III basic-enhanced framework. AT&T would be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. *This is obviously an undesirable and unintended result.*

Independent Data Manufacturer's Association, Inc., Mem. Op. & Order, 10 F.C.C.R. 13,717, 13,723, ¶ 44 (1995) (emphasis added).

The same issue arose in the context of the AT&T MFJ. There, the Bell Operating Companies (BOCs) contended that a bundled product was an "information service" not a "telecommunications service" because:

> the [telecommunications] portion of the gateway service is not offered for hire and therefore the proposal is not covered by the decree. In other words, it is claimed that so long as the [telecommunications] portion of the service is not separately identified to the customers and not separately charged to the customer, it is not offered for hire even though it is bundled in the overall gateway service, which is clearly offered for hire.

United States v. *Western Elec. Co., Inc.*, 907 F.2d 160, 163 (CADC 1990). The D.C. Circuit, however, rejected that conclusion as a "strained interpretation of the language of the decree" that could not have been intended because it would allow the BOCs to "create an *enormous loophole* in the core restriction of the decree" through the nicety of bundling telecommunications with an information service. *Ibid.* (emphasis added).

3. The Commission's recognition that Congress adopted the *Computer Inquiries* and AT&T MFJ framework in the 1996 Act—and thereby dictated the conclusion that marketing bundles continue to contain a regulable telecommunications service—is apparent from the FCC's classification, prior to the proceedings now under review, of the DSL-based Internet access service provided by telephone companies. Although telephone companies provide DSL over their copper telephone wires, while cable companies provide their service over cable wires, the statute does not give any effect to that difference. See 47 U.S.C. 153(46) (defining telecommunications service functionally, "regardless of the facilities used").

Prior to the rulemaking in this case, the Commission evaluated the proper classification of DSL service under the Act. Rejecting precisely the argument that it now accepts—*i.e.*, that the use of telecommunications to access information processing functions changes the statutory classification of the telecommunications—the FCC held that the distinct functions of DSL-based Internet access service mean that tele-

phone companies are offering two distinct services for regulatory purposes:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services *separately*: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998) (emphasis added).

Congress's determination to adopt the *Computer Inquiries* and AT&T MFJ framework precludes the Commission's interpretation of the statute in the *Declaratory Ruling*.

C. Congress's Purpose in Designating "Telecommunications Service" as Common Carriage Supports the Plain Language of the Definition of Telecommunications Service.

1. In addition to the fact that the statutory definitions are clear, Congress's determination to mandate that providers of telecommunications services be subject to common carriage regulation absent regulatory forbearance by the Commission precludes a reading under which the regulatory status of those services changes merely because a carrier bundles a telecommunications service with an information processing application. That self-interested economic choice by the provider is not relevant to Congress's regulatory goals.

In the *Computer Inquiries*, the Commission explained that the purpose of its "basic" and "enhanced" categories was to maintain the nondiscrimination regime applicable to common carriage, so that providers of information processing services would be able to compete on a level playing field with carriers:

> [A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which advanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.

Computer II, 77 F.C.C.2d 384, ¶ 231.

The most basic requirements of common carriage regulation are the related obligations "to furnish such communication service upon reasonable request therefor," 47 U.S.C. 201(a), and not "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," *id.* § 202(a). Non-discrimination is the fundamental principle of federal telecommunications law, embodied not merely in the 1996 Act, but also in the 1934 Act it amended and in the statutes that were the basis for the 1934 Act. As this Court has explained, the common carrier provisions of the Communications Act of 1934 are largely modeled after the Interstate Commerce Act (ICA), enacted in 1887, and "share its goal of preventing unreasonable and discriminatory charges." *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). The principal purpose of the ICA was to address the "wrongs resulting from unjust discrimination

and undue preference." *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907).[7]

The *Computer Inquiries* rested on the Commission's "concern[] * * * that carriers providing both basic telecommunications services and enhanced services could discriminate against competitive enhanced service providers that sought to purchase underlying transmission capacity from the carrier." *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7420, ¶ 3 (2001). Put differently, the discrimination concern at which the Act's common-carriage requirements are directed is *enhanced*, not diminished, when regulated services are combined with unregulated services.

Here, the fact that cable companies are requiring their customers to purchase telecommunications together with information services, if anything, makes common carriage regulation more necessary, not less. As noted, cable modem service is made up of two components: a telecommunications link and information processing features. Simple economics dictates that not every information service provider can build its own communications network; nor could the public be expected to pay for such duplication. Thus, if consumers are to receive the benefit of information services provided by any-

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[7] The principle of common carriage and the requirement of nondiscrimination run through more than a century of congressional enactments. For example, in 1894, this Court held that telegraph companies, like "railroad companies and other common carriers," were "instruments of commerce" in the exercise of public employment, and were therefore "bound to serve all customers alike, without discrimination" under the ICA. *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1, 14 (1894). In 1910, the Mann-Elkins Act, 36 Stat. 539, 544-545 (1910), expanded the ICA's jurisdiction to include the rates and practices of telephone companies. The Transportation Act, 41 Stat. 456, 474 (1920), further expanded the federal government's jurisdiction to include "the transmission of intelligence by wire and wireless."

one other than the owners of transmission networks, those networks must be treated as common carrier networks. The respondents in this case include two independent Internet service providers (ISPs) that are in business to sell information services to residential and business customers. Unless ISPs are able to purchase transmission services that allow them to deliver their information processing services to their customers, those customers will not as a practical matter receive their services. Customers will not be willing to pay twice—once for the information processing features of the cable company, and again for those of the independent ISPs—and generally are unwilling to deal with two providers in order to obtain a package of services that they can obtain from one. If independent ISPs are to be able to market their services successfully, they must therefore be able to purchase the transmission link and create their own bundled offerings. The Commission's treatment of the cable modem service bundle—*i.e.*, excluding from regulation the transmission service that constitutes the essential "building block" of the offering—thus puts all such ISPs at a great competitive disadvantage. See *Computer II*, 77 F.C.C.2d 384, ¶ 231.

Under the nondiscrimination rules applicable to common carriers, in contrast, there would be a level playing field. Absent regulatory forbearance by the Commission, the cable companies would be required to sell the telecommunications link to respondent ISPs on nondiscriminatory terms. With a level playing field with respect to the telecommunications link, subscribers would have the benefit of competition between independent ISPs and the cable companies on the basis of the unregulated information services bundle that each offers. There is no reason to believe that Congress intended to give facility owners an advantage in the provision of information services.

2. The Commission cannot avoid the foregoing on the theory that it supposedly has "jurisdiction" to impose "regulatory obligations on providers of information services" under "Title I of the Communications Act, 47 U.S.C. 151-161,

which provides the agency authority over interstate and foreign communications." FCC Br. 4 (citing 47 U.S.C. 151, 152(a); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968)). That turns the regime Congress enacted—presumptive regulation of common carriage, subject to regulatory forbearance—on its head. In any event, to the extent that the Commission means that it has authority to apply regulations similar to those that apply to common carriers (the only kind of regulation that has any meaning here), it is incorrect.

The regulatory requirements of the Act generally spring from title II (not title I) and apply almost without exception only to "carriers" or "common carriers," terms that the Act treats as synonymous. See 47 U.S.C. 153(10). The definition of "telecommunications carrier" includes the limitation that a carrier "shall be treated as a common carrier under this Act *only* to the extent that it is engaged in providing telecommunications services." *Id.* § 153(44) (emphasis added). Accordingly, unless the "telecommunications" that the Commission concedes is being purchased by millions of subscribers is also a "telecommunications service"—precisely the conclusion the Commission rejected in this proceeding—the Commission may not impose common carrier regulations on providers of that ubiquitous transmission service. See *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (relying on "unequivocal" statutory language in 47 U.S.C. 153(10) providing that a radio broadcaster shall not be treated as a common carrier "insofar as such person is so engaged" in broadcasting).

A partial list of the statutory sections that the Commission's interpretation would make inapplicable to the transmission element of cable modem service illustrates the extraordinary consequences of the Commission's reading: section 10[8]

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[8] 47 U.S.C. 160. For all sections of the Act in title II, the section numbers of the Act and the U.S. Code section numbers in title 47 are the same. Accordingly, the U.S. Code sections are not indi-

(Commission authority to forbear from applying provisions of the Act or regulations with respect to telecommunications carriers or telecommunications services); section 201 (common carrier to provide service upon request); section 202 (unlawful for common carrier to discriminate); section 206 (common carrier liable for damages for violating the Act); section 207 (person damaged by common carrier may file complaint); section 209 (Commission may order carrier to pay damages); section 214 (only common carrier may construct and operate communications facilities); section 222 (duty of telecommunications carrier to protect customer information); section 228 (common carriers protected from liability for transmitting pay-per-call services); section 251 (telecommunications carriers have duty to interconnect networks)[9]; section 253 (states may not prohibit provision of telecommunications service); section 254 (universal service is an evolving level of telecommunications services); section 255 (providers of telecommunications service must ensure accessibility by disabled persons); and section 621(b)(3) [47 U.S.C. 541(b)(3)] (prohibiting franchising authorities from regulating telecommunications services provided over a cable system).

The Commission's decision holds that no part of cable modem service is a telecommunications service. Accordingly, none of the provisions listed immediately above may be applied to the transmission component of cable modem ser-

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vidually cited here, although they are referenced in the Table of Authorities.

[9] The duty of telecommunications carriers to interconnect their networks provides a striking example of the chaos that the FCC's interpretation would cause. Unless the transmission underlying information services is a telecommunications service, the requirements at 47 U.S.C. 201(a), 251(a) and 332(c)(1)(B) that every common carrier interconnect with the facilities and equipment of other common carriers would not apply, and the interconnected "network of networks" that makes up the Internet and the rest of the national communications infrastructure would cease to function.

vice. Cable modem service is offered to millions of people. These services are delivered over lines that use public rights of way, are advertised ubiquitously to the public, and are sold as standard offerings at non-negotiable, off-the-shelf rates. See EarthLink Ninth Circuit Supplemental Excerpts of Record (EarthLink S.E.R.) 0235-37. Despite these characteristics, the Commission has—on the theory that Congress formed no intention regarding the application of its comprehensive regulatory regime to these ubiquitous public offerings—implausibly read the statute to remove the transmission component of cable modem service from the reach of virtually every otherwise applicable statutory provision whenever a carrier decides to market that telecommunications with information services.

III. THE COMMISSION'S CONTRARY ARGUMENTS REGARDING THE STATUTORY TEXT LACK MERIT.

The FCC attempts to avoid the plain meaning of the definition of telecommunications service, a definition that the Commission has conceded that Congress intended to mirror the framework of the *Computer Inquiries* and AT&T MFJ. It contends that the statute simply does not address the question of how to characterize bundled offerings. Alternatively, the FCC suggests that the communications component of cable modem service does not fit within the terms of the definition of "telecommunications service" because it does not include "telecommunications." Finally, it contends that because cable modem service is an "information service," it follows under the statute that cable modem service cannot include a "telecommunications service"; that is, that information services and telecommunications services are "mutually exclusive." Each of those arguments is meritless.

A. It Is Not Plausible to Believe that Congress Left Unresolved the Fundamental Question of How to Determine Which Services Constitute Common Carriage.

The FCC contends that this is a case of "statutory silence" (Br. 14) because "[t]he Communications Act does not mention cable modem service or expressly state how the Commission should classify and regulate that service" (*id.* at 3). The Act also does not mention facsimile transmission, or DSL, or frame relay service, or T-1 lines, or fiber-optic cable. Yet the Commission has never before contended, and cannot plausibly argue, that Congress was not aware of or did not intend for the Act to cover those services. As this Court has observed with respect to the Transportation Act of 1940, "[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms." *American Trucking Ass'ns* v. *Atchison, Topeka, & Santa Fe Ry. Co.*, 387 U.S. 397, 409 (1967). See also *United States* v. *Monsanto*, 491 U.S. 600, 608-09 (1989) (failure to mention particular application of statutory term "'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.'" (internal citations omitted)).

It is not plausible to believe that Congress intended to delegate to the Commission through silence or ambiguity the bedrock question—on which fundamental aspects of federal regulation turn—of how to decide who qualifies as a common carrier. That is especially true given that the only apparent purpose of adding the terms "telecommunications service" and "telecommunications carrier" to the Act was to address that very question.[10]

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[10] Even if this case were more narrowly regarded as addressing only the regulatory classification of cable modem service—as opposed to bundled offerings generally—it would not be reasonable to conclude that Congress left that question to the Commission's discretion. At the time it considered and passed the 1996 Act, Con-

The definition of telecommunications carrier also includes the exception that proves the rule that Congress did not delegate to the Commission the task of generally determining how to decide who is and who is not a common carrier. The definition of telecommunications carrier—after specifying the general statutory requirement—adds the caveat "that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. 153(44). Congress thus clearly knew how to confer the authority now claimed by the Commission, but it did not do so here.

In *MCI* v. *AT&T*, 512 U.S. 218 (1994), this Court rejected a closely analogous argument by the Commission that

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gress was well informed of the emergence of broadband technologies, including cable modem service. "Cable companies had begun providing high-speed Internet service, as well as traditional cable television, over their wires even before 1996." *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 331 (2002). In 1995 the General Accounting Office delivered to every member of Congress a report on the "Information Superhighway" identifying the "primary challenge" in the "near term" as "provid[ing] broadband digital services over the existing plant—the hundreds of thousands of miles of copper wire and coaxial cable." GAO, *Information Superhighway; An Overview of Technology Challenges, Report to Congress* (Jan. 1995) at 59-60. Petitioner NCTA (then operating as the National Cable Television Association) emphasized to Congress in 1995 that cable represented the ideal competitor to the dial-up technology of telephone networks: "Our systems today pass over 95 percent of homes in the U.S., and carry up to 900 times more information than telephone facilities. Already several leading cable companies are building state-of-the-art communications facilities that deliver voice, video and data over the same wire. Put simply, if this committee wants to bring competition to the local phone monopoly, we are it." *Telecommunications Policy Reform: Hearings before the Senate Committee on Commerce, Science, and Transportation*, 104th Cong. (1995), S. Hrg. 104-216, at 2 (testimony of NCTA President Decker Anstrom).

Congress by statutory ambiguity had delegated to it the power to eliminate tariff filing. "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231. The claimed delegation here is even more fundamental, because the Commission now asserts the power to determine that virtually all broadband interstate wire transmission services are not only unregulated, but *unregulable* as common carrier services. See *supra* Part II.C.2. Adding to the implausibility that Congress made such a fundamental delegation is the means by which the Commission claims that delegation was carried out: silence.

B. The Statutory Text Refutes the Commission's Arguments that the Telecommunications Component of Cable Modem Service Does Not Fit Within the Definition of Telecommunications Service.

1. The Commission's Assertion that Cable Modem Service Does Not Include a Telecommunications Service Because It Does Not Include "Telecommunications" Is Wrong and Internally Contradictory.

a. Respondents demonstrated in Part II.A, *supra*, that there is no merit to the Commission's claim that the telecommunications component of cable modem service must be offered on a "stand-alone basis" to satisfy the definition of a "telecommunications service." The statutory text imposes no such requirement.

b. The Solicitor General, seemingly recognizing that the Commission's position has no foundation in the text, attempts to resuscitate it through another statutory provision. Advancing an argument that did not form the basis of the Commission's ruling below, the government contends that cable mo-

dem service is not a "telecommunications service" because it does not include the required "telecommunications." The Act defines the latter term as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). Cable modem service, the government now contends, fails this test because it "involves the general capability for changing the form or content of information." FCC Br. 15. "[B]ecause the cable operator does not *offer* transparent transmission capacity in such a way that the subscriber can use it *without* a corresponding change in the form or content of the information transmitted, the cable operator is not providing a telecommunications service." *Id.* at 24 (emphases in original).

That claim fails for three separate reasons. First, as discussed *supra* Part I, the subscriber *is* able to use the transmission apart from the information processing features of the bundled service. The subscriber can instead use third-party e-mail services and the like.

Second, contrary to the government's argument, a service does not cease to provide telecommunications if it in some respect "involves the general capability" to change the content or form of information. FCC Br. 15. Instead, under the plain terms of the definition, a service includes "telecommunications" so long as the "*transmission*" does not produce a "change in the form or content of the information as sent and received." 47 U.S.C. 153(43) (emphasis added). There is no argument that the high-speed communications pipeline provided by cable modem service changes subscribers' information in the course of transmission. Indeed, if subscribers could not be sure that, for example, the content of their e-mails would not be changed during transmission, few people would use the service. The fact that some *other* component of cable modem service—specifically, its information processing functions performed by computers at the ends of the transmission network—may change the information *apart*

from the transmission does not affect whether telecommunications are provided in the first instance.

Third, and perhaps most important, the government's "telecommunications" argument is *entirely* self-defeating. If the Commission were correct that cable modem service does not include "telecommunications," then cable modem service equally is not, as the Commission claims, an "information service." The term information service is defined to include only those information processing functions that are delivered "via telecommunications." 47 U.S.C. 153(20).

2. Information Services and Telecommunications Services Are Not "Mutually Exclusive."

The Commission argues that cable modem service is an "information service" under the Act. Pet. App. 95a. Standing alone, that argument proves nothing because the issue is whether cable modem service (however it is characterized as a bundled offering) *includes* a telecommunications service—namely, the high-speed telecommunications pipeline. Respondents do not contend that the information service bundle as such is regulated. Rather, respondents contend, and the Ninth Circuit agreed, that the telecommunications component retains its separate regulatory status under the definition of "telecommunications service."

Therefore, in order for its *Declaratory Ruling* to be upheld, the Commission must prevail on its argument that the terms information service and telecommunications service are "mutually exclusive." Pet. App. 97a. That contention is merely a reprise of its flawed reliance on the definition of telecommunications. According to the Commission:

> [A] "telecommunications service" is the "offering of telecommunications for a fee directly to the public," and the item offered to the public—"telecommunications"—must be a "transmission * * * of information * * * without change in the form or content of the information as sent and received." An information service, by contrast,

> generally *does* result in a change to the form or content of the transmitted information in some manner. Therefore, the Commission concluded, the categories of "telecommunications service" and "information service" are "mutually exclusive."

FCC Br. 5-6 (emphasis in original) (internal citations omitted). This argument seriously misreads the text of the statute for the reasons just described. In cable modem service, the "transmission" does not change the form or content of information. If the Commission's contrary view were correct, cable modem service would not be an "information service" because it would not be provided "via telecommunications." 47 U.S.C. 153(20).

In addition, the plain language of the Act demonstrates that a particular offering may simultaneously be an "information service" and, in part, a "telecommunications service." Nothing about the statute suggests otherwise. Especially in light of the fact that the definitions of "information service," "telecommunications," and "telecommunications service" by their terms rely upon one another, it is exceedingly unlikely that Congress would have intended such a fundamental regulatory question as is presented here to be resolved by a silent inference that one term ("telecommunications") that is used to define a second term ("information service") cannot be given its defined meaning when it is used in a third term ("telecommunications service").

Finally, neither the terms of the statute nor its structure suggest that Congress intended that a bundled offering—even if considered an information service as a whole—would not encompass a regulable telecommunications service. To the contrary, when Congress intended that a particular service could not be subject to common carriage it explicitly said so. See 47 U.S.C. 153(10) (radio broadcasting may not be treated as common carriage); *id.* § 332(c)(2) (prohibiting common carrier regulation of private mobile services); *id.* § 641(c) (prohibiting common carrier regulation of cable service).

Congress also contemplated that a single entity could provide both telecommunications services and other services, and that neither classification would swallow the other. For example, a carrier "shall be treated as a common carrier under this Act *only to the extent that* it is engaged in providing telecommunications services." *Id.* § 153(44) (emphasis added). See also *id.* § 332(c)(1)(A) (commercial mobile service providers treated as common carriers "insofar as such person is so engaged"); *id.* § 571(a)(3) (title VI to apply "[t]o the extent that" common carrier provides video programming other than as prescribed).

3. Cable Companies "Offer" Telecommunications, Rather Than Merely "Use" Telecommunications.

The Commission's third and final argument relating to the definition of telecommunications service is that cable companies are "using" telecommunications to provide their information services, not "offering" telecommunications. Pet. App. 98a. Not so. As a statutory matter, it is the subscriber that is "using" the telecommunications component in the sense relevant to the Act. "Telecommunications" is "the transmission, between or among points specified by *the user*, of information of *the user's* choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43) (emphasis added). The user in this context—*i.e.*, the party that selects the information transmitted—is the subscriber, and not the cable company.

As a factual matter, it is plain that cable companies are "offering" the telecommunications component to their subscribers. No one doubts that the communications component has independent economic value to the subscriber, and hence to the cable company selling it. Indeed, if the cable company is not offering the transmission, who is? As Judge Thomas said in his concurring opinion below, "[u]nder the FCC's approach, the general public would be purchasing a service that nobody offered." Pet. App. 31a. For their part, the cable in-

dustry petitioners emphasize that the distinct telecommunications function is the defining characteristic of cable modem service that customers seek:

> The coaxial connection allows much greater bandwidth – and thus greater speed – than a dial-up connection. Moreover, the connection is "always on": the user need not "dial up" an ISP to initiate a session. *These qualities* made cable modem service very popular, and its growth has been explosive.

NCTA Br. 4 (citations omitted) (emphasis added). Customers buy cable modem service first and foremost for the speed of its telecommunications function. To say that a company does not "offer" precisely the service the customer seeks to buy is nonsensical.

C. Because Congress Adopted the Framework of the Commission's *Computer Inquiries* and the AT&T MFJ in the Definitional Provisions of the 1996 Act, the Commission Is Not Free to Reject that Framework Now.

The Commission recognizes that its construction of the term telecommunications services cannot be reconciled with the *Computer Inquiries* and the AT&T MFJ, which it previously acknowledged Congress adopted in 1996. See *supra* Part II.B. Unable to fit its conclusions into that framework, the Commission has chosen instead to reject it. Although petitioners' *amici* accuse the Ninth Circuit of "disregard[ing] [this] twenty-five year-old body of regulatory law interpreting the Act" (Telecomm. Indus. Ass'n Br. 5), the Commission cannot bring itself to make such an absurd assertion. Rather, the FCC is forced to concede that "[i]n the instant order, the Commission concluded that the regulatory framework adopted in the *Computer Inquiries* did not control its classification of Internet access services provided by cable operators." FCC Br. 35. It was only on this basis that the Commission was able to ignore its own clear rulings and those of

the courts concluding that the telecommunications component of bundled offerings retains its independent regulatory status.

The FCC's only explanation for its complete about-face with respect to the proper construction of the Communications Act is that it now regards the *Computer Inquiries* as "legacy regulatory structures developed in another era to address different concerns." FCC Br. 36 n.16. The straightforward answer is that Congress did not leave that choice to the Commission at the threshold of characterizing a particular offering. Not only did Congress adopt the framework of the *Computer Inquiries* and the AT&T MFJ, it *specifically provided* by statute that the definition of telecommunications service applies "regardless of the facilities used." 47 U.S.C. 153(46). It thus makes no difference whether dial-up telephone service, DSL, or cable wires are involved. Although Congress did empower the Commission to account for different technologies and the state of different markets—and on that basis to determine how to regulate various telecommunications services—it did so through the statute's forbearance procedures, see 47 U.S.C. 160, *not* the antecedent question of how the service is classified.[11]

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[11] The FCC states that "cable operators providing cable modem service have never been viewed as common carriers." FCC Br. 36. But that is not only irrelevant to the question of classification, it is true only as a consequence of the Commission's own inaction. Moreover, in fact, cable companies are not strangers to common carriage. They sued the Commission and won the right to be recognized as local exchange carriers in *City of Dallas, TX* v. *FCC*, 165 F.3d 341, 353 (CA5 1999) (rejecting Commission claim that statute providing privileges to local exchange carriers was "silent" with respect to cable companies that also operated as local exchange carriers). Cable companies also have been providing tariffed telecommunications services for years as state-certificated common carriers over the same networks they use to provide Internet access services. See EarthLink Reply Comments in GN Docket No. 00-185, at 1-5, reproduced in EarthLink S.E.R. at 0229-0234.

The Commission has moreover emphasized that the Telecommunications Act of 1996 must be construed in light of the fact that, "at the time the statute was enacted, the Computer [Inquiries] framework had been in place for sixteen years." As a result, "a decision by Congress to overturn [the] Computer [Inquiries]" would have constituted "a major change in regulatory treatment" that ought not be implied. *Universal Service Report to Congress*, 13 F.C.C.R. at 11,524, ¶ 45. The Commission could find no persuasive evidence of "an intent by Congress to do so. As a result, looking at the statute and the legislative history as a whole, we conclude that Congress intended the 1996 Act to *maintain the Computer [Inquiries] framework*." *Ibid.* (emphasis added). In its ruling in this case, the Commission once again found no persuasive evidence of a Congressional intent to abandon the definitional framework of the *Computer Inquiries*; it simply abandoned that framework itself. The Commission does not have that power.

IV. THE COMMISSION'S REMAINING ARGUMENTS DO NOT JUSTIFY ITS DEPARTURE FROM THE STATUTORY TEXT.

A. Congress Addressed the Question Whether Telecommunications Services Should Be Deregulated Through the Statutory Forbearance Regime, Not the Antecedent Question Whether an Offering Constitutes a Telecommunications Service.

The FCC contends that its construction is supported by Congress's general deregulatory goals in the 1996 amendments to the Communications Act. Br. 2. But that argument founders on the fact that Congress in the 1996 Act, as in most statutes, did not pursue one goal to the exclusion of all others. Rather, it balanced numerous concerns, including the substantial need for regulation in order to protect consumers and further universal service. Regulation of telecommunications facilities and services has been the rule, not the exception, since the inception of federal regulation in the 1880s. The 1996

Act updated that regulatory structure, rather than abandoning it. The Commission itself previously recognized that regulating carriers providing telecommunications service—the approach it rejected here—appropriately balanced the interests Congress was pursuing. "Limiting carrier regulation to those companies that provide the underlying transport ensures that regulation is minimized and is targeted to markets where full competition has not emerged." *Universal Service Report to Congress*, 13 F.C.C.R. at 11,546, ¶ 95.

In any event, the Commission's position cannot be reconciled with Congress's expression of its deregulatory goals. The Commission relies on section 706 of the 1996 Act, which directs the FCC and state commissions with authority over telecommunications services to use "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment" with respect to "advanced telecommunications capabilities." 47 U.S.C. 157 note. See Pet. App. 46a-47a. But the Commission's reliance on section 706 is *totally inexplicable*. The first three methods specified by section 706 (including forbearance) apply *only* to common carriers covered by title II of the Act; that is, they apply *only* to "telecommunications services." The FCC's construction is irreconcilable with the clear directive of section 706 because it deems cable modem service not to include a telecommunications service.

The decision of the Ninth Circuit, by contrast, designates the transmission component of cable modem service as a common carrier telecommunications service, subject to the Commission's forbearance authority codified at 47 U.S.C. 160. That section allows the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services," provided that the test set forth in that section is met. *Ibid.*; see also *AT&T* v. *City of Portland*, 216 F.3d at 879

(noting Commission's "broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest"). Specifically, the Commission "shall forbear from applying any regulation or provision of this Act" that is not necessary to prevent discrimination, protect consumers, or protect the public interest. 47 U.S.C. 160(a).

Congress intended that these forbearance procedures—rather than the antecedent characterization of a particular offering as an information service—would provide the mechanism to account for the changing conditions in the telecommunication markets. The salient features of the forbearance authority are that it provides a fifteen-month deadline and substantial procedural protections to affected consumers and competitors.[12] The Commission itself ostensibly directed that the "debate over issues such as independent ISP access to cable facilities should take place" *not* in the determination of the regulatory classification of cable modem service, but in a separate proceeding addressing "what federal regulatory obligations" should apply. FCC Br. 32. But, by defining the transmission services of cable-based Internet service providers entirely out of the common carrier regime—indeed, entirely out of the *statutory* scheme—the FCC impermissibly seeks to remove the statutory constraints Congress imposed through the forbearance regime.

It is therefore essential to recognize that the Ninth Circuit in this case did not resolve the ultimate question whether the

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[12] The Commission has promptly resolved several forbearance proceedings in the past, see, *e.g.*, *MCI Worldcom* v. *FCC*, 209 F.3d 760 (CADC 2000), and there are indeed multiple petitions pending before the Commission with respect to the very title II relief at issue here, see, *e.g.*, *Petition of Verizon Telephone Companies For Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect To Their Broadband Services*, WC Docket 04-440 (filed Dec. 20, 2004).

FCC must subject cable modem service to common carrier obligations. It decided only the question of categorization, which is in turn the only question now before this Court. And its holding that cable companies cannot escape their common carrier obligations through the nicety of bundling is obviously right. The Ninth Circuit left it to the FCC in the first instance to determine on remand, under the criteria Congress specified in 47 U.S.C. 160, whether to lift cable companies' common carrier obligations. That judgment should be affirmed and the Commission permitted to make the appropriate findings with respect to forbearance in light of the record before it.

B. The Private Petitioners' Arguments Regarding the Commission's Treatment of Non-Facilities-Based ISPs Have No Application to Cable Modem Service Provided By Network Owners.

NCTA argues (Br. 22-23) that respondents prove too much by demonstrating that the plain language of the Act specifies that the transmission component of cable modem service is a telecommunication service. NCTA urges that respondents' construction would make non-facilities-based information service providers—*i.e.*, providers that, in contrast to cable companies, do not own telecommunications networks—common carriers. Because they have not been treated as such in the past, NCTA reasons, that outcome could not have been contemplated by Congress. NCTA's argument is flawed because it assumes that the deregulation of non-facilities-based ISPs turns on the definitions in the Act. It does not; it turns on forbearance.

In order to understand fully the rule that Congress incorporated into the definitions that it adopted in 1996, it is necessary to understand a distinction that the Commission drew in the *Computer Inquiries* between facilities-based and non-facilities-based providers of information services. The Commission applied the same *definitional* framework with respect to both types of carriers. It held that, while the "enhanced" bundled offering of both types of carriers was unregulated,

the telecommunications component of that bundled offering was a regulated "basic," common carrier service. See *supra* Part II.B. However, the Commission determined that duplicate regulation of that basic service—first when provided by the facility owner and again when resold by the non-facilities-based carrier—was not required. "Deregulation of entities that do not have underlying facilities and that obtain transmission capacity from others pursuant to their tariffs is sensible; no policy goal is served by regulating any aspect of these entities' offerings." *Third Computer Inquiry*, Proposed Rule, 50 Fed. Reg. 33,581, 33,588, ¶ 46 n.34 (1985). In the terminology of the Communications Act as amended in 1996, the Commission decided to forbear from regulating the telecommunications service within the information service provided by non-facilities-based providers.[13] But by contrast—and this is the critical distinction for purposes of this proceeding, which involves the owners of cable networks—the Commission determined that common carriage regulation must apply to the telecommunications component of offerings by facilities-based carriers.

The distinction drawn by the Commission between facilities-based and non-facilities-based carriers also explains why a great deal of what the Commission relies upon from its *Universal Service Report to Congress* is inapplicable here. The Commission itself acknowledges, but does not explain, the significance of the distinction when it concedes that "[i]n the *Universal Service Report*, the Commission did not resolve the regulatory classification of 'cable operators providing Internet access,' 13 F.C.C.R. at 11535 n.140, or other information service providers that provide service using their own transmission facilities, see *id.* at 11530 ¶ 60." FCC Br. 8. Thus, to the

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[13] See *Computer & Comms. Indus. Ass'n* v. *FCC*, 693 F.2d 198, 212 (CADC 1982) ("Our approval of limited forbearance from Title II regulation of common carrier services by the Commission does not give the Commission unfettered discretion to regulate or not regulate common carrier services.").

extent that the *Report* speaks of the transmission component of Internet access service historically not being regulated as common carriage, it is referring to the act of forbearance that the Commission undertook with respect to non-facilities-based providers twenty-five years ago. The rule that the Commission and the courts have applied time and again in the intervening period, however, and the rule of which Congress was aware and adopted, treats the transmission component of information services offered by facilities-based providers—such as cable companies—as a common carriage telecommunications service. See *supra* Part II.B.

C. The Commission's *Declaratory Ruling* Cannot Be Sustained on the Basis of *Chevron* Deference.

The FCC's construction cannot be saved on the ground that the relevant definitions of the Act are ambiguous, such that under *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Commission is entitled to adopt any reasonable interpretation. Even if *Chevron* deference applies, respondents prevail because the Commission's construction is unreasonable.

Perhaps the most telling feature of the Commission's brief is that it does not even attempt to argue that it has adopted the best construction of the Act. *Chevron* deference is precluded here by the plain text of the statute, its history, and its overall structure. "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 600 (2004).

This Court's precedents moreover establish that the argument for *Chevron* deference is substantially undercut when an agency inconsistently construes the governing statute. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."

INS v. *Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (internal citation omitted). Here, not only is the conflict between the Commission's current construction of the statute and its prior precedent (including its post-1996 precedent) stark, its new interpretation is unreasonable. The FCC simply rejected its own settled understanding that Congress intended to adopt the framework of the *Computer Inquiries* and the AT&T MFJ with the sole "explanation" is that its prior interpretations of the Act were only intended to apply to telephone lines, not cable facilities. Pet. App. 101a-102a. That is a distinction that the FCC itself admits is impermissible under the Act's facilities-neutral terms. See *id.* 90a. It moreover completely failed to acknowledge or distinguish the policy concerns underlying its own precedent, including particularly its recognition that allowing carriers to decide their own regulatory status on the basis of how they bundled their services would undermine the entire statute. See *supra* Part II.B.

The Commission also ignores the significant contradiction in its construction of the term "information service" in the Communications Act and the almost identically defined term in a parallel statute, the Communications Assistance for Law Enforcement Act (CALEA). 47 U.S.C. 1001 et seq.[14] Under CALEA, "telecommunications carriers" are required to design and build their networks so as to make them accessible to law enforcement agencies conducting lawful electronic surveillance and intercepts. See *id.* § 1002. The definition of "telecommunications carrier," however, expressly excludes "persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i). The Commission acknowledges that the definitions of "information service" in the Communications Act and CALEA are almost indistinguishable. *Communications Assistance for Law Enforcement*

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[14] The CALEA definition of "information services," 47 U.S.C. 1001(6), is identical in operative part to the definition of "information service" at 47 U.S.C. 153(20) and is set forth in full in the Appendix to this brief at 9a-10a.

Act and Broadband Access and Services, 19 F.C.C.R. 15,676, 15,705, ¶ 50 (2004) (CALEA NPRM). Because that is the case, the Department of Justice, including expressly the Office of the Solicitor General, wrote to the Commission and "stated its belief that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA." EarthLink BIO App. 14a.

To try to avoid the outcome under CALEA that these law enforcement officials recognized would result from the *Declaratory Ruling* in this case, the Commission initiated a rulemaking on the application of CALEA to broadband Internet services. There, the Commission has proposed to read the relevant definitions, including the definition of "information services" so that a facilities-based cable company that is providing both transmission and information services such as e-mail "by definition * * * cannot be providing an information service for purposes of CALEA." CALEA NPRM at 15,706 ¶ 50. Thus, in contrast to its holding in the *Declaratory Ruling* that Internet access service is *entirely* an information service, the Commission in its CALEA docket has proposed to construe the term information services in such a way that cable modem service would "by definition" *never* be an information service. Such shenanigans are not the stuff of deference.

Finally, the Commission's claim to deference is substantially undercut by the fact that the Commission adopted its interpretation against the backdrop of the *judicial* construction of the statute by the Ninth Circuit in the *City of Portland* decision. Although the court of appeals correctly deemed itself bound by *stare decisis* because that prior decision rested on the statute's plain meaning (see Pet. App. 18a-19a (citing *Mesa Verde Construction Co.* v. *Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (CA9 1988) (en banc)), we agree with petitioners that this Court is of course not bound by that ruling. We also agree that the Commission logically

was not required as a matter of law to adhere to *City of Portland* in announcing a national standard in this case.

Nonetheless, it cannot be the case that the Commission was empowered to ignore entirely the substance of the judicial construction of the Communications Act in *City of Portland*. Cf. *Neal* v. *United States*, 516 U.S. 284, 294-95 (1996). If basic principles of administrative law obligate an agency to give a reasoned explanation for its departure from prior agency practice, see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), it follows *a fortiori* that it must give a substantial explanation for its refusal to follow prior judicial precedent.

Yet, just as the Commission failed to address its own prior understanding of the Communications Act, so too it failed to address the substance of the Ninth Circuit's reasoning in *City of Portland*, dismissing the decision out of hand with the entirely procedural assertions that the Ninth Circuit did not have (1) the "benefit of briefing by the parties or the Commission" on the issue, Pet. App. 116a, or (2) the benefit of the "comprehensive" record the Commission had compiled in its proceeding below, *id.* 115a. The reason that the lower court did not have "the benefit" of the Commission's thinking however, is that the Commission, although participating as amicus, chose not to provide its views. See *City of Portland*, 216 F.3d at 876. Moreover, the Commission's emphasis on the lack of a comprehensive record before the *Portland* court contrasts sharply with its recognition that the question presented is purely one of law. See United States' Motion for Leave to Dispense with Preparation of a Joint Appendix (granted Jan. 24, 2005).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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